Supreme Court, U.S.
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No. 04-989

IN THE

Supreme Court of the United States

SARAH JENKINS HORTON *et al.*,

Petitioners,

v.

BANK ONE, N.A., *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

SUPPLEMENTAL BRIEF

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SUPPLEMENTAL BRIEF

All parties agree, and the Petition and the Brief in Response both demonstrate, that the Court is confronted in this case with a clean, square, irreconcilable conflict on a jurisdictional issue of national importance—*viz.*, where a national bank is "located" for purposes of federal diversity jurisdiction. The existence and importance of this conflict is confirmed by the Brief *Amicus Curiae* filed by the American Bankers' Association (ABA) in this case, and by the petition presenting the same issue filed in *Wachovia Bank, N.A.* v. *Schmidt*, No. 04-1186.

The remaining question is ***when*** (not whether) the Petition should be granted. Wachovia has suggested that the Court's decision on the petition in this case should be delayed to allow the Court to decide Wachovia's petition at the same time. See Br. of Wachovia Bank, Nat'l Ass'n as *Amicus Curiae* in Support of Neither Party at 3 ("Wachovia Br."); Pet. for Writ of Certiorari at 3, 18, *Wachovia Bank, N.A.* v. *Schmidt* (No. 04-1186). Bank One had no inherent objection to following that course, despite the fact that it was unclear whether the delay would serve any purpose since there are no problems with using this case as the vehicle to resolve the pure legal question presented in both cases. Now, however, there is a real risk that the *Wachovia* petition may not be fully ripe for resolution before the end of the Term. The *Horton* petition is ripe for resolution now. Accordingly, and because of the important and time-sensitive nature of the issue presented, this case should no longer be held for *Wachovia*. If resolution of the *Wachovia* petition is delayed beyond the April 22 Conference (at which both petitions are currently scheduled to be considered), the Court should consider the *Horton* petition immediately and hold the *Wachovia* petition pending a resolution of *Horton* on the merits.

1. As the petition in this case demonstrates and the Brief in Response confirms, there is no impediment in this case to a

full and complete consideration of the question presented. The issue is squarely presented. Resp. 4-5, 10-11. There is a mature and acknowledged conflict concerning this issue among at least three, and perhaps as many as six, courts of appeals. *Id.* at 5-6. Those courts have rehearsed in detail the relevant arguments, and have reached fundamentally different conclusions as to those arguments. *Id.* at 6-8. And this jurisdictional issue is of paramount importance. *Id.* at 8-10. In short, this case is an ideal vehicle for fully considering the question presented.

2. After Bank One filed its Brief in Response, Wachovia—acting as *Amicus Curiae*—suggested that disposition of the petition in this case should be held until Wachovia could file a petition presenting the same issue in another case. Wachovia Br. at 3. Wachovia's suggestion that the Court defer consideration of this case was predicated on the assertion that to do so "would not materially delay the resolution of this case"—because Wachovia would file its own petition early in order to ensure that both petitions would be considered before the end of the Term. *Id.* at 4. And, it appears that the Court accepted Wachovia's suggestion to consider the two petitions in tandem: The *Horton* petition was circulated on March 2 for consideration at the March 18 Conference, yet no action was taken at that Conference, nor was *Horton* immediately relisted. *Horton* was not relisted until after respondents waived response in *Wachovia*, at which time both the *Horton* and *Wachovia* petitions were circulated for consideration at the Court's upcoming April 22 Conference.

Bank One did not oppose Wachovia's suggestion that the petitions be considered together, on the understanding that the *Horton* petition would still be considered this Term. But, there now exists a real risk that *Wachovia* will not be considered before the end of the Term. This case already has been postponed by a month because *Horton* was decided before *Wachovia*. Now, respondents in *Wachovia* have waived response. It is almost certain that the Court will request a re-

sponse, but allow the *Wachovia* respondents 30 days within which to file.[1] Thus, by the time the Court orders a response and one is actually filed, it is quite possible that there will be no more conferences before the end of the Term.

Given the possibility of significant delay in *Wachovia*, holding the *Horton* petition pending *Wachovia* can no longer be justified. *Horton* squarely poses the question presented; nothing in particular is gained by having it consolidated with *Wachovia*. Moreover, banks with pending cases will suffer prejudice if the *Horton* petition is delayed over the summer. Where diversity jurisdiction is concerned, "a case may not be removed ... more than 1 year after commencement of the action." 28 U.S.C. § 1446(b). If the petition in this case is held pending disposition of the *Wachovia* petition, and certiorari is not granted until the end of September, then the case will not be argued until January, and a decision is unlikely to issue before next March. Such a delay effectively guarantees that banks in the Fourth Circuit will be denied the federal forum to which they are entitled—for, as *Amicus Curiae* ABA has properly noted, courts within the Fourth Circuit have already begun remanding cases for lack of diversity, see ABA Br. at 4 & n.4, and those cases will be more than one year old by the time a decision by this Court likely would be handed down.

The importance of this issue is ample reason for the Court to consider *Horton* and grant certiorari no later than its April 22 Conference. How the term "located" is interpreted for purposes of diversity jurisdiction affects every national bank, and determines whether the federal courts have jurisdiction in potentially every case involving such a bank. Whatever benefit might once, arguably, have been gained by considering

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[1] When response has been waived, the Court normally does not grant a petition for certiorari without first requesting a response from the respondents. *See* Robert L. Stern et al., *Supreme Court Practice* 461-62 (8th ed. 2002).

Horton and *Wachovia* together is now more than outweighed by the delay that *Wachovia* is imposing upon both cases.

CONCLUSION

For the foregoing reasons, and those set forth in the Petition and the Brief in Response, the Court should consider the Petition in this case without regard to what transpires in the *Wachovia* case that presents the identical question.

Respectfully submitted,

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